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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

GEORGE F. JEWETT, JR., *et ux.*,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ADELAIDE C. GRISWOLD, AMORY HOUGHTON, JR., JAMES R. HOUGHTON, ELEANOR C. HALLENBECK, LAURA H. BEER, ELEANOR H. COLE AND THE ESTATE OF AMORY HOUGHTON, AS *AMICI CURIAE*

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Interest of the Amici Curiae*

This brief is submitted on behalf of Adelaide C. Griswold, Amory Houghton, Jr., James R. Houghton, Eleanor C. Hallenbeck, Laura H. Beer, Eleanor H. Cole and the Estate of Amory Houghton, as *Amici Curiae*, urging reversal of the decision of the United States Court of Appeals for the Ninth Circuit in the instant case.

The *Amici* have a substantial interest in the instant case in that six of them have cases now pending in the United States Tax Court which involve, *inter alia*, the same question of law as is presented in the instant case. The names and Tax Court Docket Numbers of the cases are as follows: Adelaide C. Griswold (Docket No. 12876-79), James R. Houghton (Docket No. 12878-79), Amory Houghton, Jr. (Docket No. 12880-79), Laura H. Beer (Docket No. 12877-79), Eleanor C. Hallenbeck (Docket No. 12879-79) and Eleanor H. Cole (Docket No. 12891-79). Hearings have been held before the Honorable Darrell D. Wiles in four of the cases, and the parties have filed post trial briefs. Judge Wiles has not yet rendered a decision. Hearings have not yet been held in the cases of Laura H. Beer and Eleanor H. Cole.

The remaining *Amicus*, the Estate of Amory Houghton, also faces litigation involving the same question of law. Amory Houghton, prior to his death, filed a claim for refund with the Internal Revenue Service (the "Service"), and the Service has denied the claim. The Estate of Amory Houghton intends to litigate the denial of the claim.

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* Letters of the Petitioner and the Respondent giving their consent to the filing of this brief have been filed with the Clerk of this Court.

The *Amici* (with the exception of Amory Houghton and Eleanor H. Cole) were contingent remaindermen of a trust created under the Will of their grandfather, Alanson B. Houghton, who died on September 16, 1941. The income from the trust (the "1941 Trust") was payable to their aunt, Elisabeth Houghton ("Elisabeth"), during her life. Upon her death, the income was payable to her issue, *per stirpes,* or, if none, to the then living grandchildren of Alanson B. Houghton and to the issue of his deceased grandchildren, *per stirpes.* Upon the the death of the measuring life, Laura H. Beer (one of the above-named *Amici*), the 1941 Trust is to terminate and the corpus is to be distributed to the then living issue of Elisabeth, or, if none, to the then living grandchildren of Alanson B. Houghton and to the issue of his deceased grandchildren, *per stirpes.*

In September of 1941, when the 1941 Trust was created, Elisabeth was only 32 years of age and in good health; whereas the *Amici* were the following ages: Adelaide C. Griswold—17 years of age; Amory Houghton, Jr.—15 years of age; Eleanor C. Hallenbeck—9 years of age; James R. Houghton—5 years of age; and Laura H. Beer—3 years of age. Elisabeth died without issue on March 2, 1974. Shortly after her death, the *Amici* disclaimed their contingent remainder interests in the 1941 Trust *in toto.*

The remaining two *Amici,* Amory Houghton and Eleanor H. Cole, are the children of Alanson B. Houghton. They were contingent remaindermen of an *inter vivos* trust that Alanson B. Houghton created on December 10, 1934. The income from the trust (the "1934 Trust") was payable to Elisabeth (who was the younger sister of these two *Amici*) during her life. Upon Elisabeth's death, the income was payable to her then living issue, or, if none, to the then living issue of Alanson B. Houghton in equal shares *per stirpes.* Upon the death of the measuring life, Eleanor

C. Hallenbeck (one of the above-named *Amici*), the 1934 Trust is to terminate, and the corpus is to be distributed to the then living issue of Elisabeth, or, if none, to the then living issue of Alanson B. Houghton in equal shares *per stirpes*.

At the time of the creation of the 1934 Trust in December of 1934, Elisabeth was only 26 years of age and in good health; whereas Amory Houghton was 35 years of age and Eleanor H. Cole was 38 years of age. As noted, Elisabeth died without issue on March 2, 1974. Shortly after her death, Amory Houghton and Eleanor H. Cole both disclaimed their contingent remainder interests in the 1934 Trust *in toto*.

The Service has taken the position that the disclaimers by the *Amici* resulted in taxable transfers for Federal gift tax purposes.

Under Treasury Regulation § 25.2511-1(c) (the "Treasury Regulation") a disclaimer will not result in a taxable transfer for Federal gift tax purposes if it is made within a reasonable time after the disclaimant first acquires "knowledge of the existence of the transfer". One of the positions taken by the *Amici* in their cases is that the "transfer", for this purpose, occurred upon the death of Elisabeth, the life income beneficiary, in March of 1974, and not upon the creation of the 1941 Trust in September of 1941 or upon the creation of the 1934 Trust in December of 1934. Accordingly, since the *Amici* disclaimed their contingent remainder interests shortly after the "transfer", their disclaimers were not taxable transfers. This is essentially the same argument that the Petitioner in the instant case is making. Accordingly, the *Amici* have a substantial interest in this Court's review of the instant case.

The *Amici's* cases are distinguishable from the instant case in a number of important respects. The distinguish-

ing features, however, serve only to accentuate the inequity of the Service's position that, for Federal gift tax purposes, the timeliness of a disclaimer of a contingent remainder interest in a trust is measured from the creation of the trust rather than from the death of the life beneficiary.

For example, the *Amici* allege that they did not have any knowledge (i.e., either actual knowledge or reason to know) of their remainder interests in the trusts at the time of the creation of the trusts in 1934 and 1941. Five of the seven *Amici* did not learn of their interests until shortly *after* the death of Elisabeth, the life beneficiary. Upon acquiring this knowledge, they all promptly disclaimed their interests *in toto*. The remaining two *Amici* did not learn of their specific interests until shortly before the death of Elisabeth, and, promptly after the death of Elisabeth, they also disclaimed their interests *in toto*.

In the cases now pending in the Tax Court, the Service acknowledges that, under the Treasury Regulation, the period of time during which the disclaimer must occur does not commence to run until the disclaiming party has "*knowledge of* the existence of the transfer". The Service contends, however, that "knowledge" for this purpose does not mean actual knowledge but rather mere reason to know. It then argues that, if the *Amici* did not for a period of many years prior to disclaiming their interests have actual knowledge of their contingent remainder interests, they had reason to know of them. The Tax Court, accordingly, now has before it the question of law as to whether, within the meaning of the Treasury Regulation, the term "knowledge" means actual knowledge or mere reason to know. In addition, it has before it the question of fact as to when the *Amici* first acquired that requisite state of knowledge.

A second distinguishing feature between the *Amici's* cases and the instant case relates to the nature and extent

of the contingencies to which the remainder interests were subject. In the instant case, the Petitioner, in order to receive a possessory interest in the trust, had only to survive his grandfather, father and mother, who were the life beneficiaries. In addition, the specific share of the trust that he would receive was dependent upon the number of his siblings who also survived the life beneficiaries or who had issue who survived the life beneficiaries.

In contrast, the remainder interests of the *Amici* were all subject to far greater contingencies, the cumulative effect of which was to render it highly unlikely, as of the time that the trusts were created, that the *Amici* would ever receive any possessory interest whatsoever in the trusts. Moreover, the contingencies were such that even if the remainder interests did ultimately become possessory, the amount or value of the possessory interests was almost totally conjectural.

The *Amici* are filing this brief in order to insure that this Court will be cognizant of the far reaching effect that its decision in the instant case will have and of the even more harsh and inequitable results that could flow to other taxpayers if this Court does not reverse the decision of the Ninth Circuit herein.

The *Amici* advance the following specific arguments in support of their position that the decision of the Ninth Circuit in the instant case should be reversed:

ARGUMENT

I.

The Petitioner satisfied the condition of Treasury Regulation § 25.2511-1(c) because the date of the "transfer" occurs upon the death of the last surviving income beneficiary, not upon the creation of the trust.

The interpretation of the Treasury Regulation by the Ninth Circuit places an unfair and unreasonable burden on a taxpayer wishing to disclaim a remainder interest where the remainder interest is subject to contingencies similar to those faced by the Petitioner. The effect of such an interpretation is to force the taxpayer to disclaim a property interest at a time when he does not know either the amount or value of the interest he is disclaiming or whether he will ever receive such interest. Obviously, the policy of the Federal gift tax law is not, and should not be, to require taxpayers to disclaim a remainder interest prior to the time that they know what they are disclaiming.

The *Amici,* like the Petitioner, are also faced with this unreasonable and erroneous interpretation of the Treasury Regulation. An examination of the contingencies that the *Amici* faced upon the creation of their trust interests, both as to their remainder interests in income and as to their remainder interests in corpus, readily demonstrates the absurdity of this interpretation.

In order to become entitled to any income from the 1934 Trust (i) the *Amici* (i.e., Amory Houghton ("Amory") and Eleanor H. Cole ("Eleanor")) had to survive Elisabeth, who was 9 years younger than Amory and 12 years younger than Eleanor, *and* (ii) Elisabeth had to die without issue. In December of 1934 Elisabeth was only 26 years of age and in good health. The likelihood that Amory or Eleanor would ever receive any interest in the

income of the trust was, therefore, exceedingly remote. Obviously, the far greater likelihood was that Elisabeth would have children or that, since she was considerably younger than the *Amici,* she at least would survive them.

The likelihood that the *Amici* would ever receive any interest in the corpus of the trust remainder was even more remote because, in order to do so, they had to survive Elisabeth and the measuring life, and the measuring life was 33 years younger than one of the *Amici* (i.e., Amory) and 36 years younger than the other *Amici* (i.e., Eleanor).

Moreover, even if it ever did eventuate that Amory or Eleanor acceded to a possessory interest in the trust, the contingencies were such as to render it impossible to ascertain, as of the time the trust was created, the amount or value of the interest that they would receive. In the case of the interest that they would receive in the income of the trust remainder, their percentage share was dependent upon the number of issue of Alanson B. Houghton who survived Elisabeth. In the case of the interest that they would receive in the corpus of the trust remainder, their percentage share was dependent upon the number of issue of Alanson B. Houghton who survived the measuring life.

In order for the five remaining *Amici* to become entitled to any income from their trust (i.e., the 1941 Trust) they had to (i) survive the life income beneficiary, Elisabeth, *and* (ii) Elisabeth had to die without issue. As noted, at the time of creation of the 1941 Trust, Elisabeth still was only 32 years of age and in good health. Accordingly, there was every reason to expect that, in the normal course of events, she would have children with the result that the *Amici* would never have received a possessory interest of any kind in the trust.

Moreover, even if Elisabeth died without children and the *Amici* survived her, there was a further contingency

as to the amount of the income interest they would receive since their percentage share was dependent upon the number of other grandchildren of Alanson B. Houghton who either survived Elisabeth or who had issue that survived Elisabeth. Furthermore, in order to receive any interest in the corpus of the trust remainder, the *Amici* (with the exception of Laura H. Beer) also had to survive Laura H. Beer (who was younger then the other *Amici*). Again, even if the *Amici* had satisfied the triple contingencies of (i) having Elisabeth die without issue, (ii) surviving Elisabeth, and (iii) surviving the youngest grandchild, each of the *Amici's* percentage share in the corpus of the trust remainder was dependent upon the number of grandchildren who survived Laura H. Beer, or who had issue that survived Laura H. Beer.

Accordingly, because of the number of family members and the tremendous variance in their ages, it would have been impossible to ascertain at the time that the two trusts were created whether any of the *Amici* would ever receive a possessory interest in the trusts, or, if such a possessory interest did eventuate, what the amount or value thereof would be.

The most extreme of the situations in this regard, of course, is that posed by the two *Amici* (i.e., Amory and Eleanor) who were considerably *older* then the life beneficiary. It was highly unlikely that they would survive the life beneficiary, wholly apart from the further unlikelihood that the life beneficiary (a woman of only 26 years and in good health at the time the trust was created) would die without issue. To measure the timeliness of the disclaimer of such remote remainder interests from the date of the creation of the trust (i.e., December of 1934) is not only unreasonable but, indeed, patently absurd. To do so would impose on these *Amici* the unreasonable burden (both in terms of unnecessary effort and

expense) of disclaiming their remainder interests at a time when it was unlikely that they would ever receive anything whatsoever from the trust or, if the unexpected occurred, at a time when the amount or value of what they would ever receive was almost totally conjectural.

As a matter of policy and common sense, a remainderman, of course, should not be put to the burden of having to disclaim his remainder interest when it is subject to these types of contingencies. This principle, moreover, is implicitly recognized in the Treasury Regulation since it refers to the time when the disclaiming party first acquires "knowledge" of the transfer and provides that the disclaimer does not constitute a taxable gift so long as it is made within a reasonable time after such "knowledge" is first acquired.

This principle also was recognized by the Eighth Circuit in *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973), *rev'g* 58 T.C. 352 (1972), which held that the reasonable time for disclaiming a contingent remainder interest commenced upon the death of the life income beneficiary, and not upon the creation of the trust. The Eighth Circuit focused on the fact that prior to the death of the life income beneficiary the contingent remainderman had nothing to accept or renounce. The Eighth Circuit, citing this Court in support of its reasoning, stated:

> "A remainder subject to divestment [i.e., contingent remainder] does not convey or transfer any actual control or current beneficial interest in property to the remainderman. In *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 42-43, 60 S. Ct. 51, 55, 84 L.Ed. 20 (1939), the Supreme Court in construing an earlier gift tax statute where the Government was unable to determine which construction of the statute would be most advantageous to it from the point of revenue collected said: 'When

> the gift tax was enacted Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title.' In discussing the taxable event of the relinquishment of the power of revocation as distinguished from the transfer of the corpus in trust, the Court said its dominant principle or rationale has been:
>
> > '. . . that "taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed" See Corliss v. Bowers, 281 U.S. 376, 378 [50 S.Ct. 336, 74 L.Ed. 916]; Saltonstall v. Saltonstall, *supra*, 261 [276 U.S. 260, 48 S.Ct. 225, 72 L.Ed. 565 (1928)]; Burnet v. Guggenheim, *supra* 287 [288 U.S. 280, 53 S.Ct. 369, 77 L.Ed. 748 (1933)] and that a retention of control over the disposition of the trust property, whether for the benefit of the donor or others, renders the gift incomplete until the power is relinquished whether in life or at death.' 308 U.S. at 43, 60 S.Ct. at 56." 480 F.2d at page 64.

The fairness of this approach was further underscored by the Eighth Circuit in *Cottrell* v. *Commissioner*, 628 F.2d 1127 (8th Cir. 1980) (*en banc*), *rev'g* 72 T.C. 489 (1979), which again involved the issue of when the reasonable time to disclaim a contingent remainder interest commenced. The court, in following *Keinath*, stated:

> "It is only fair—or so Congress and the Treasury could well have concluded in enacting § 2511 and issuing regulations thereunder—that a taxpayer know what property is involved before being put to her election whether to accept or disclaim it." 628 F.2d at page 1131.

Applying these principles to the instant case, the date of the "transfer" for purposes of the Treasury Regulation should not be the date of the creation of the trust, but should be that point in time when the contingencies, both as to receiving any possessory interest whatsoever and as to the amount or value of such possessory interest, are eliminated. In the instant case, that date will not occur until the last income beneficiary dies. In light of these considerations, the *Amici* respectfully submit that the Ninth Circuit's decision in the instant case that the timeliness of the disclaimer is instead to be measured from the creation of the trust is unreasonable and erroneous.

II.

The disclaimer by the Petitioner did not constitute a taxable transfer under Section 2511 of the Code because the disclaimer was effective and timely under applicable local law.

If the Treasury Regulation does not admit to the construction that the transfer in a situation such as the instant case occurs upon the death of the life income beneficiary when the contingencies are eliminated, then it does not constitute a reasonable interpretation of Section 2511 of the Internal Revenue Code of 1954, as amended (the "Code"), and is therefore invalid. The correct interpretation of Section 2511 of the Code is that a disclaimer does not constitute a taxable transfer for Federal gift tax purposes where, as here, it is effective and timely under applicable local law.

Section 2511 of the Code provides that the Federal gift tax shall be imposed "whether the *transfer* is in trust or otherwise, whether the gift is direct or indirect . . . ." (emphasis added). It is well established that if a disclaimer

is valid under applicable local law, it does not constitute a "transfer" by the disclaimant because title to the property is considered never to have vested in the disclaimant or passed through his hands. Scott, *The Law of Trusts*, § 36.1 (3rd Ed. 1967); *Albany Hospital* v. *Albany Guardian Society*, 214 N.Y. 435, 108 N.E. 812 (1915).

The issues of effectiveness and timeliness of disclaimers for Federal gift tax purposes are the same as those for Federal estate tax purposes, because the Federal gift tax and the Federal estate tax are "in *pari materia* and must be construed together." *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 44 (1939).

It was established in *Brown* v. *Routzahn*, 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933), that a disclaimer which is effective and timely under applicable local law is not a taxable transfer for Federal tax purposes. In *Brown*, a husband disclaimed a bequest under his wife's will eight years after the will had been probated and his interest had become indefeasibly vested and possessory. The Sixth Circuit looked to the applicable local law (Ohio) on the issues of effectiveness and timeliness, and held that the disclaimer, being effective and timely under local law, was not a taxable transfer for Federal estate tax purposes.

The rule established by the Sixth Circuit in *Brown* was, ironically, embraced by the Ninth Circuit, as well, in *Commissioner* v. *Estate of Vease*, 314 F.2d 79 (9th Cir. 1963), *rev'g* 35 T.C. 1184 (1961). The Ninth Circuit cited *Brown* and then observed:

> "It was there laid down that the federal tax on transfers . . . is levied on the transfer of property; not on the exercise of a right to renounce testamentary gifts. Accordingly, if under local law a legatee or devisee has the option of accepting or

> rejecting his testator's bounty, rejection of the gift does not result in a taxable transfer to its residuary recipient." 314 F.2d at 88.

The Eighth Circuit in *Keinath* reaffirmed the correctness of this approach by looking to state law for guidance as to the effectiveness and timeliness of a disclaimer for Federal tax purposes. As noted, the Eighth Circuit held, with respect to the disclaimer of a contingent remainder interest in a trust, that since under applicable local law the "transfer" occurred upon the death of the life income beneficiary and not upon the creation of the trust, the "transfer" for Federal gift tax purposes occurred upon the death of the life income beneficiary. *See also Cottrell, supra.*

In the instant case the disclaimer was timely and effective under applicable local (Massachusetts) law. Accordingly, the disclaimer did not constitute a taxable transfer for Federal gift tax purposes under Section 2511 of the Code. If (contrary to Argument I above) the Treasury Regulation does not admit to this construction, it does not constitute a reasonable interpretation of Section 2511 of the Code and is therefore invalid.

III.

The legislative history of Section 2518 of the Code clearly indicates that the Eighth Circuit decision in *Keinath* correctly interprets existing law.

The legislative history of Section 2518 of the Code indicates that the primary concern in enacting that Section was to create uniformity throughout the country in the Federal gift tax consequences that result from disclaim-

ers. The legislative history states that the concern was that:

> "The Federal tax consequences of a disclaimer will largely depend upon its treatment under local law . . . As a result identical refusals to accept property may be treated differently for estate and gift tax purposes depending upon applicable local law." H.R. Rep. No. 94-1380, 94th Cong., 2d Sess. 66, reprinted in 1976-3 C.B. (Vol. 3) 800.

Accordingly, Congress acknowledged that the Eighth Circuit decision in *Keinath* was the correct result under existing law, but that, because of the variance in local law, *Keinath* might not apply in all cases. Under similar local law (such as the law of Massachusetts which governs in the instant case), a similar result would, however, occur.

Congress was careful, in the effective date provision of Section 2518 of the Code, to indicate which disclaimers were affected by the new rule. If Congress had determined that the Eighth Circuit decision in *Keinath* was an incorrect interpretation of existing law, it presumably would have required that all existing remainder interests be disclaimed within a certain time period. Instead, Congress chose a far less stringent effective date provision that applies the new Section only to transfers creating an interest in the disclaimant made after December 31, 1976. Pre-Section 2518 law is to continue to apply to interests created by transfers made prior to that date.

Section 2518 of the Code was enacted as part of the Tax Reform Act of 1976 (the "Act"). It is therefore of great significance to compare and contrast the legislative history of Section 2518 of the Code with that of other provisions of the Act.

For example, with respect to Section 2101(b) of the Act relating to a cooperative housing corporation's ability to

take depreciation deductions, the legislative history states that the decision by the Tax Court in *Park Place Inc.*, 57 T.C. 767 (1972), was not consistent with the original intent of Congress in enacting the existing law on the subject. The provision of the new Act was made retroactive to December 31, 1973.

The legislative history with respect to Section 805 of the Act, relating to the investment tax credit for certain vessels, demonstrates yet another approach. The Act, in this respect, provides for an investment tax credit of one-half the regular credit with respect to certain purchases made with the use of certain tax-deferred funds. The legislative history states:

> "[T]he conferees intend that taxpayers are to have the right to obtain a court determination as to whether they are, under already existing law, also eligible for the other one-half of the regular investment credit. The conferees intend that no inferences be drawn either way on this issue from the action taken here." H.R. Rep. No. 94-1515, 94th Cong. 2d Sess. 447.

With respect to disclaimers under Section 2518 of the Code, it is clear that Congress did not state, as it did with respect to the above provision of the Act relating to depreciation deductions for a cooperative housing corporation, that the case law on the subject was an incorrect interpretation of existing law. Nor did Congress state, as it did with respect to the above provision of the Act relating to the investment tax credit, that there was no case law precedent as to the proper interpretation of existing law, that no inference should be drawn either way from the new provision, and that taxpayers were invited to initiate litigation to determine their rights under existing law.

To the contrary, the legislative history with respect to disclaimers under Section 2518 of the Code refers to the

Eighth Circuit decision in *Keinath*, does not state that it is an incorrect interpretation of existing law, but instead specifically implies that Congress expects this decision to apply to cases, like the instant case, where the applicable local law is the same as that involved in *Keinath*. As stated by the Eighth Circuit in *Cottrell*:

> "The report of the Committee on Ways and Means appears to acknowledge that [the Eighth Circuit decision in] *Keinath* was a correct statement of what the law was then (and still is as to interests created before the Act's effective date)." 628 F.2d at 1131 N.7.

CONCLUSION

For all of the foregoing reasons, the *Amici* submit that the Petitioner in the instant case did not make a taxable transfer for Federal gift tax purposes when he disclaimed his remainder interest in his grandmother's trust, and that the decision of the Ninth Circuit should therefore be reversed.

Dated July 16, 1981

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